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Who are Judicial Decisions Meant For? The 'Global Community of Law' in Southern Africa

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1. Introduction

Over the last two decades a burgeoning political science literature has sought to explain the dramatic spread and empowerment of constitutional and international courts around the globe (e.g. Ackerman 1997; Hirschl 2004; Alter 2014). In a number of new democracies, notably, such courts have seemingly succeeded in dramatically expanding the scope of their activities without provoking 'backlash' from political elites. How they have been able to do this poses a puzzle for comparative politics. The most popular solution to the conundrum has been to adopt a set of assumptions from the game-theoretic literature on the U.S. Supreme Court and legislative-judicial relations (e.g. Ferejohn and Weingast 1992; Gely and Spiller 1992; Segal 1997; Rogers 2001; Vanberg 2001). In these 'separation of powers games', as Keith Whittington (2003, 432) summarises, 'judges are assumed', *inter alia*, 'to take into account the likelihood of provoking legislative sanctions if they act against legislative preferences in a given case'. Judges, that is, decide politically-sensitive cases in strategic ways, carefully interpreting 'signals' from threatened branches of government, and thus pre-empting 'backlash' against their institutions (for backlash see Helfer 2002; Alter, Helfer and Gathii 2015).

Scholars of international and constitutional courts have not, unsurprisingly, adopted such assumptions uniformly. Diana Kapiszewski (2011, 490), for instance, holds that courts are not only interested in defending their institutional integrity and promoting their policy preferences (as in separation of powers games). Rather, they 'balance a discrete set of considerations – justices' ideologies, their institutional interests, the potential consequences of their rulings, public opinion, elected leaders' preferences, and law'. For Tom Ginsburg (2003, 262-3), meanwhile, Asian courts would prefer, simply, to play a contermajoritarian role' and promote 'internationally derived notions of the rule of law'. But their capacity to play such a role is 'moderate[d]' over time by 'mechanisms of signal and countersignal' between judiciaries and the Executive. Karen Alter (2014, 60, 281), for her part, even goes so far as to argue, optimistically, that international courts generally ignore Executive preferences when making their *decisions.* In fact, 'following the clear latter of the law is arguably the safest political strategy for legal actors', because it is the strategy most likely to build political support for the IC [International Court]' from 'compliance constituencies' - organisations such as NGOs and lawyers associations that are

dedicated to promoting the rule of law. It is only when courts rule on *remedies,* Alter finds, that we should expect to see them 'adjusting to the realities of their environment'. In every case, however, the general thrust of all such analyses is the same. As Ran Hirschl (2008, 98) puts it, even the 'credible threat' of backlash from the Executive produces a 'chilling effect on judicial decision making patterns [...] who says Supreme Court judges are not shrewd political animals?'.

In this study, by contrast, I present case studies of where courts have clearly *failed* to read signals emanating from the Executive, and have subsequently paid the price for not so doing - triggering 'backlash'. One case (*Sesana* 2006) comes from the Botswanan High Court, whilst another case (*Campbell* 2008) was brought against the Government of Zimbabwe in the Southern African Development Community (SADC) Tribunal. By presenting these case studies I seek to make a modest argument for the initial plausibility, at least in restricted circumstances, of some claims made by legal theorists. Indeed, these case studies constitute (qualified) evidence in favour of the existence of a phenomenon that socio-legal scholars are generally especially keen to deny the existence of. This phenomenon is an emerging 'network' that Laurence Helfer and Anne-Marie Slaughter (1997) once famously described as a 'global community of law'. It is a network of judges who 'conceive of themselves as autonomous actors forging an autonomous relationship with their foreign or supranational counterparts' (Slaughter 1994, 123). On occasion, I will suggest, global judicial networks *can* be treated as independent variables (see introduction). They *can* explain outcomes of interest in ways the 'chilling effect' cannot. By seeking to send signals to their foreign or supranational counterparts, that is, courts have in fact ended-up undermining their institutional integrity, and have failed to act as 'shrewd political animals' in the domestic sphere.

2. Judicial Networks and Theoretical Clarification

This argument must now, however, be qualified by a whole series of caveats and qualifications. Political scientists are in many respects right to be sceptical about the significance and conceptual rigour of Slaughter and Helfer's 'global community of law'. As is typical in analyses of 'networked' international relations, this scholarship usually fails to specify how its object can be measured or identified. It makes no use, notably, of social network analysis (SNA) tools that have been specifically designed for this purpose (Hafner-Burton, Kahler and Montgomery 2009). Too often, that is to say, networks have 'remained a metaphor rather than an instrument of analysis' (Kahler 2009, 2-3). Anne-Marie Slaughter's (1994; 2003; 2004) canonical formulations have been singled out for particular criticism in this respect (cf. Meierhenrich 2009, who also takes aim at Koh 1997, Raustiala 2002 and Slaughter and Zaring 2006). At least three sets of her claims have been particularly contested. I will now

take each in turn, outlining the set of claims and the criticisms made of them, before explaining how the analysis that follows strives to answer these criticisms.

Slaughter's first set of contested claims relates to the types of 'judicial network' comprising the 'global community of law'. On this point she herself betrays some ambivalence. At her most ambitious, Slaughter (1994, 131-2) has suggested that 'mutual recognition as participants in a common enterprise' now characterises relations between courts in a 'widening community of liberal states' that has emerged since the end of the Cold War (see also Burley 1992). Such networks, then, straddle issue areas, families of legal systems, and national and supranational levels of jurisdiction; they are 'participants simultaneously in national legal systems and the construction of a global legal system' (Slaughter 2004, 243). For Slaughter's critics this overlooks how, in most issue areas at least, patterns of transnational inter-judicial communication remain largely limited to those networks created by legal education (Law and Chang 2011, 529-530). It also makes the common mistake of 'single-minded[ly]' focusing on a 'particular class of recent decisions that are claimed to be - though not demonstrated as - part of a wider trend' (Black and Epstein 2007, 796-7). A widespread tendency here, these critics allege, is that of providing examples from some areas of human rights jurisprudence - where the audiences for decisions may in fact be genuinely global - and using them to prove the existence of more general patterns (compare Carozza 2003). Indeed, Slaughter (1994, 132) herself seems at times to acknowledge this point, conceding that global networking is 'particularly potent in the human rights field', even if it 'potentially extends to all fields'. The bulk of her evidence certainly is derived from human rights law, and not from areas where we would expect global networks to be less significant, such as electoral and immigration law (see Schauer 2000, 256-7). In this study, accordingly, I restrict the scope of my claims to a certain class of case involving human rights; that area of the law where, in the words of New Zealand's most senior judge, there has been the greatest movement towards a 'common law of the world' (Cooke 2004, 273; for a helpful comparison with *sharia* jurisprudence see Waldron 2012, 212-4). I make no suggestion that my conclusions are more widely generalisable.

Slaughter's second set of contested claims relates to these networks' modes of operation. Networks may be devoted to the exchange of information and ideas, legal harmonisation, or enforcement. In every case, however, they are characterised by persuasion and 'dialogue' between the various nodes in the network; a dialogue which can now be observed at a growing number of global inter-judicial conferences, and via the increasingly common practice of courts citing foreign decisions (e.g. Slaughter 2003, 192; 2004, 51, 65; 2005; for more cautious formulations see Slaughter 1994). To this Slaughter's critics have responded that, on closer inspection, her 'dialogue' appears to be more of a 'monologue'. On Slaughter's view, for example, both the Canadian Supreme Court and South African

Constitutional Court (ZACC) 'have both been highly influential' in promoting the citation of foreign decisions. Yet by Law and Chang's (2011, 532) reckoning the South African court actually cites its Canadian counterpart almost three hundred times more often than the inverse. Indeed, Section 35(1) of South African constitution actually (uniquely) provides courts with explicit encouragement to use 'comparable foreign case law' when interpreting it. And ZACC judges are even allowed to hire up to five clerks from around the world, in addition to their two South African clerks, to assist with this (Bentele 2009, 234). The primary explanation for the drafting of this extraordinary constitutional provision was, of course, 'a reaction against South Africa's recent history as a pariah or an outcast nation' and a desire 'to identify the new South Africa explicitly with the opinions and practices of the rights-respecting world' (Schauer 2000, 259; Waldron 2012, 239, n.13). This example highlights how the language of 'dialogue' may serve to conceal unequal degrees of membership in 'the global community of law'. Empirical research has suggested that contemporary practices of citing foreign courts are not in fact new (Black and Epstein 2007, 797-9). While some of Slaughter's more radical critics have pointed out that historically such practices have been most common within imperial contexts; a pattern of unequal relations between courts replicated in contemporary 'inter-judicialism' (Buxbaum 2004). In what follows, accordingly, I do not use the term 'network' to imply horizontal or un-coercive relationships[1]. My Southern African examples, broadly speaking, will be drawn from courts in the global periphery - like the ZACC in South Africa itself - seeking 'to be received or respected or esteemed by a particular group or community of nations' (Schauer 2000, 258).

Controversies about the significance of inter-judicial conferencing, meanwhile, are closely bound up with those surrounding Slaughter's third set of contested claims: those relating to the methods appropriate for the study of judicial networks. Some critics have raised concerns about Slaughter's points could be proved. As Meierhenrich (2009, 87) asks, 'what are the measurable consequences of international conferencing?'. At this stage Slaughter could, perhaps, point to the words of judges themselves: a kind of evidence that she uses to establish the significance of foreign citation practices (e.g. Slaughter 1994, 130; 2003, 194-7; 2004, 69-79). Judges such as Michael Kirby - a former Chief Justice of the Australian High Court, and one those 'activists' often cited by Slaughter and other enthusiasts for inter-judicial dialogue - have certainly testified in unambiguous terms about the effects of such conferences[2]. Kirby (2006, 334; 2007, 36) has even go so far as to describe a 1988 meeting in

1 In social network analysis, it should be noted, the word does not have these connotations, which it has acquired in the international relations literature (see Hafner-Burton, Kahler and Montgomery 2009, 562).

2 Perhaps the most-cited 'judicial activists' are Canadian Constitutional Court Justice Claire l'Heureux-Dubé, and United States Supreme Court Justice Stephen Breyer. Comments by Breyer (2003, 268) to the American Society of International Law, cited by Kersch (2009, 95) are resonant in this respect: “what could be more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us? Wordsworth's words, written about the French Revolution, will, I hope, still ring true: “Bliss it was in that dawn to be alive. But to be young was very heaven.” [cited here from original]'.

Bangalore (organised by the Commonwealth Secretariat) as an 'epiphany' which 'rescue[d] … [his] 'mind', and 'lifted' the 'scales … from … [his] eyes' on the question of the relationship between national and international law.

Critics are of course justified in asking whether the mere 'impressions of a random and unrepresentative sample of judges' suffice to establish general trends, just as they do well to point out that many other judges actually regard these meetings as little more than opportunities for 'small talk' (Meierhenrich 2009, 88; Law and Chang 2011, 567). This study, however, is only plausibility probe. It seeks only to establish that, *a priori,* there is no reason to assume that strategic models always outperform global judicial networks as independent variables when explaining decision-making outcomes. It holds that in two cases judges have behaved *as if* their global networks mattered. It does not claim that they do so as a rule. Representative sampling is not therefore one of its concerns. In what follows I do, it is true, make use of interpretive methods and, where possible, of judges' off-bench statements (for the methodological significance of the latter Sharafi 2007; for the applicability of interpretive methods to the study of judicial networks Kersch 2009, 97; for a more general defence of these methods Brett 2014). And in many places this evidence is indirect or impressionistic, making precisely the kind of metaphorical use of 'networks' that Kahler (2009, 2-3) has complained about[3]. On one occasion I even refer to a novel written by a judge. But the purpose of such material is merely supplementary. It is intended to provide indications of why global judicial networks are a particularly plausible candidate from among all the many possible alternative explanations to those proposed by signalling games.

Let us now recap the argument thus far. What I am seeking to show is that courts cannot always be assumed to be sending and receiving signals only to legislatures and/or Executives, as in separation of powers games. Evidence for this is the absence of the 'chilling effect' such models anticipate, leading to backlash. Such an outcome is, however, consistent with the existence of a global judicial network to which courts may seek to appeal. Despite broad-based scepticism in the literature about the scope and significance of this network, even critics do in fact allow that it may be consequential in some areas of human rights jurisprudence, particularly in cases where courts are seeking to claim full membership in 'the rights-respecting world'. Law and Chang (2011, 529, n.18) concede, for example, that there may be

3 One particular area of imprecision relates to the question of whether the 'global community of law' is composed simply of judges, or also of human rights activists, legal academics and so forth. On this point my analysis retains all the unfortunate ambiguity of Helfer and Slaughter's (1997) original formulation. In very general terms, however, I would defend this on the grounds that, as legal sociologists Lucien Karpik and Terence Halliday (2011) have argued, 'writing on political jurisprudence and the politics of courts has settled into a peculiarly silo-like existence where courts and judges are treated as if they were entirely free of those embedding legal professions that may provide them legitimacy, bring them cases, formulate doctrines, disseminate their rulings, build their institutional capacities and protect them against their critics'.

'exceptions to the practical requirement that domestic courts address their opinions to those will be bound by them'. And they cite the case of Michael Kirby's 'outlier interpretations' of Australian law, which 'were written less for other Australian justices, or even future generations of Australians, than for a global audience'. The two Southern African case studies outlined below are precisely of this 'exceptional' sort, and are intended as plausibility probes to test the assumptions behind strategic models of decision-making in politically controversial cases. Finally, although this network's precise modes of operation cannot, unfortunately, be illustrated in this particular case, some brief indications have already been provided for how they might work more generally. There is clear evidence that some judges - especially of the 'activist' sort I focus on here - believe conferencing to be significant. While if the citation of foreign courts may not always represent a 'dialogue', it certainly has represented a means by which courts from the global periphery have signalled desires for membership of the 'global community of law'.

To be clear, finally, I am not claiming here that there will ever be a case where a court is *only* concerned to address itself to an audience of legal practitioners. To do so would be to fall into the same trap as so much legal theorising, and to treat adjudication as a purely self-contained activity uncontaminated by wider social forces (for excellent discussion Cotterrell 1995, 91-112). It would also be doubly absurd in an African context, where Executive interference with judicial autonomy is so commonplace (see VonDoepp and Ellett 2011, 151-2)[4]. Here informal 'signalling' of Executive preferences is frequently of the most unambiguous kind, with bribes, threats of violence, and physical attacks all being considerably more common than in Latin America, for example (Llanos, Weber, Heyl and Stroh 2014, 14)[5]. What I do want to suggest, however, is that the evidence from my cases - however exceptional they may be - should be enough to illustrate the inadequacy of analytical frameworks that *categorically* exclude (global) judicial networks from their 'signalling games'.

3. Case studies

In both the case studies which follow I highlight three salient features that illustrate the argument outlined above. There can be no doubt, firstly, about the degree to which Executives favoured certain outcomes. Indeed, both cases represent instances of what Hirschl (2008, 98) has called 'the judicialisation of mega-politics'; the most dramatic of all the ways in which courts and constitutional bodies worldwide have expanded their activities beyond the application of individual rights provisions and basic procedural justice norms over the last three decades. Adjudicating 'such matters is an inherently and substantively political exercise' (Hirschl 2008, 99). Subcategories of 'mega-political'

4 VonDoepp and Ellett's (2011) evidence comes from Namibia, Tanzania, Malawi, Zambia and Uganda
5 Llanos, Weber, Heyl and Stroh (2014) compare Benin, Madagascar and Senegal with Chile, Paraguay and Argentina.

judicialisation include the 'judicial scrutiny of executive-branch prerogatives in the realms of macroeconomic planning or national security … [the] judicialization of electoral processes; judicial corroboration of regime transformation; [and] fundamental restorative-justice dilemmas' (for election disputes as 'pure politics' see Miller 2004; for African examples Steytler 1995; VonDoepp 2009; Ellett 2013). But one of Hirschl's sub-categories has done more than any other to expand court 'involvement in the political sphere beyond any previous limit'. That is 'the judicialisation of formative collective identity, nation-building processes, and struggles over the very definition or raison d'etre of the polity as such' (Hirschl 2008, 98). Examples of this process include the Israeli Supreme Court beginning to rule on *which* Judaism is referred to by the country's constitutional self-definition as a 'Jewish and democratic state'. While in Canada, similarly, the Supreme Court ruled in 1995 that unilateral Quebecois secession would be illegal even following a majority vote, and that secessionist claims had no basis in international law (for these examples Hirschl 2004). Both the cases under discussion are of this kind. Even more threateningly for the Executive, moreover, they both connect questions of 'formative collective identity' with constitutional questions about land rights; something that in the African context is always and inevitably 'tightly wrapped in questions of authority, citizenship, and the politics of jurisdiction' (Lund and Boone 2013, 1).

In both cases, secondly, dominant legal opinion suggests that the court could, at little or no legal cost, have decided the case in a manner less threatening to the Executive. Legally speaking, that is, they had a choice. But Executive signalling - which was inevitable given the political stakes clarified above - failed to elicit the 'shrewd' political behaviour or 'tactical balancing' anticipated by strategic models of decision-making (Hirschl 2008, 98; Kapiszewski 2011, 490). By behaving as if they were signalling to global legal audiences, courts then provoked, thirdly, backlash from the Executive. In both cases the nature of this backlash was of a kind which VonDoepp and Ellett (2011, 152) characterise as a 'general institutional assault'. As I will show, in the *Campbell* case from Zimbabwe this assault was even more profound, and resulted in fundamental institutional restructuring. In the Botswanan case, meanwhile, backlash was limited to 'deliberately failing to abide by court rulings or bypassing judicial institutions' - notwithstanding some speculation about the effect of the court ruling on recent judicial appointments (see VonDoepp and Ellett 2011, 152). Both cases are ones which I have been following closely since 2011, and I have been able to conduct twenty interviews with their observers and participants.

(a) *Campbell v Republic of Zimbabwe* (2008)

I begin with the case that led to the most dramatic instance of backlash against an international court in recent history: the decision by Southern African states to strip the SADC Tribunal of its human

rights jurisdiction (Alter 2014, 58; Alter, Gathii and Helfer 2015). The ferocity of these states' reactions is only comprehensible once the symbolic significance of *land* in Zimbabwean politics is understood (contrast the account that focuses on non-intervention in Nathan 2013). For those readers unfamiliar with this history I therefore begin by providing some brief context below. Those readers looking for more background are referred to the magisterial account in Alexander (2006).

(i) Historical context

In 1978 40 per cent of land in Zimbabwe (then Rhodesia) belonged to white farmers. Whites as a whole made up less than 4 per cent of the population (Selby 2006, 117). Thanks to the Land Tenure Act of 1969, which intensified colonial segregation, Africans could not own land privately. In 1980, famously, and under pressure from newly-independent Mozambique, the ZANU and ZAPU liberation movements agreed to a democratic transition which was significantly below their initial expectations (Mtisi, Nyakudya, and Barnes 2009, 165). The country's independence constitution, most notably, entrenched property rights for 10 years. The decade that followed therefore saw a series of administrative orders gazetting land defeated in the courts on procedural grounds. These cases were usually paid for from a Commercial Farmers Union (CFU) legal defence fund established for the purpose (Selby 2006, 239). Some influential ruling-party technocrats, who believed in the legitimacy of legal routes to land redistribution, complained in this period, amid much controversy, that the higher courts imposed overly-restrictive conditions on land redistribution (e.g. Alexander 2006, 181; Pilossof 2012, 34).

By the late 1990s, however, as is well-known, ZANU-PF (the ruling party) faced economic crisis and its first serious electoral threat: the Movement for Democratic Change (MDC) (see Dorman 2001; Raftapolous 2009). Faced with becoming the first ex-liberation movement in the region to lose power, it abandoned its self-presentation as a modernising regime committed to rational-legal norms. In their place it adopted a (not wholly unsuccessful) nationalist and anti-colonial legitimation strategy that scholars of the region have labelled 'patriotic history' (Ranger 2004; Tendi 2010, chapter 8; Southall 2013, 5). It now forcibly expropriated commercial farmland - which it ceased to consider as simply a national economic asset - and it now sought to justify its authority in rural areas on nationalist and (in places) neo-patrimonial terms (cf. Moore 2005; Marongwe 2008, chapter 5). In 2001 President Mugabe declared that 'the courts can do what they want. They are not courts for our people and we should not even be defending ourselves in these courts' (Chan 2003, 167). Generally speaking, however, the government continued to insist on the legality of its actions, even going to considerable lengths to retrospectively rationalise land seizures via legislation (e.g. Kibble 2013, 93-4).

(ii) *Campbell*

It was the most significant of these legislative rationalisations - the Constitutional Amendment Act No.17 (2005) - that finally divided the CFU from a significant constituency of farmers. Return to expropriated farms was now explicitly forbidden. And the CFU was no longer willing to mount legal challenges in the Zimbabwean courts, which had had their composition dramatically altered by the Executive in the wake of an initial ruling in farmers' favour (ICG 2004, 90; Widner and Scher 2008, 262-5; Pilossof 2012). A splinter group, led by English-born Ben Freeth – now sought to challenge the expropriation of their farms, and land reform as a whole, on the international stage (see Freeth 2011, chapter 10). They attracted support from a range of internationally-famous lawyers working *pro bono*, notably from South Africa (see Brett 2015). Their initial tactics involved using local counsel to exhaust domestic remedies. They challenged the constitutionality of Constitutional Amendment Act No.17 in the Zimbabwean Courts, fully expecting to lose - as they promptly did (David Drury, interview, Harare, 4th April 2012; Ben Freeth, interview, Harare, 5th April 2012). By doing so, however, they were able to bring the case before the soon-to-be-opened SADC Tribunal in Windhoek; one of a new breed of international courts allowing individual petition which had emerged in Africa since the early 1990s (Alter 2014, 82-84).

The Campbell case in Windhoek centered around three issues: 1) the legality of a clause in Amendment 17 ousting court jurisdiction, 2) the necessity for farmers to be compensated at a 'fair' rate, and 3) the question of whether Fast-Track Land Reform (FTLR) as a whole amounted to racial discrimination. This last point was, of course, a direct challenge to the 'patriotic history' narrative at the heart of ZANU-PF ideology, and a dramatic example of Hirschl's (2008) 'judicialisation of mega-politics'. Initially, in response, the Government of Zimbabwe (GOZ) sought to delay proceedings. A month's breathing space was reportedly gained, for example, by citing a broken fax machine in the President's office (Freeth 2011, 164). Then, in late June, when accused of not protecting farmers joined to the *Campbell* claim, the GOZ lodged a counter-affidavit 'substantially to the effect that there is a state of lawlessness prevailing in the country' (*Campbell v The Republic of Zimbabwe*, ruling on urgent application, 30th July 2008, paragraphs 2-4). When the Tribunal heard the main case in mid-July the government's legal team (led by Minister of Justice and Legal Affairs Patrick Chinamasa) asked for a one hour delay to consult 'their principals' in Harare. After their request for a further delay was rejected, Judge President Luis Antonio Mondlane famously declared that 'we are trying to build a house of justice in this region'; a statement later widely cited as evidence of the Tribunal's wish to be to be 'received or respected or esteemed' by the 'global community of law' (e.g. Gauntlett 2012). Dramatically, however, and as shown in a documentary about the trial *Mugabe and the White African*, this decision to rule on

the case prompted the GOZ's legal team to walk out of court (Bailey and Thompson 2009).

Despite this clear 'signalling' of the Executive's attitudes towards proceedings, however, the Tribunal's decision was not in its favour. To the GOZ's dismay, it rejected the state's assertion that FLTR constituted a legitimate 'public purpose' in the special circumstances of a post-colonial state, reasoning that:

> 'we wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination' (in Zongwe 2009, 23).

Contrary to the expectations of most strategic models of decision-making, only on the issue of remedies did the Tribunal go at least some way towards catering for Executive preferences (see Alter 2014, 60). The GOZ was only 'directed to take all necessary measures through its agents to protect the possession, occupation and ownership of the lands of the Applicants'. It was not required to do the (now) impossible, and 'restore the rule of law in commercial farming areas' within six months, as had been ordered by the Zimbabwean Supreme Court in 2001 (see Pilossof 2012, 54).

(iii) Backlash

This cautious approach to remedies, however, was not enough to insulate the court from backlash. Almost immediately after *Campbell*, the GOZ began arguing that the Tribunal was illegally constituted because the relevant protocol of the SADC Treaty had not been ratified (see Hondora 2010, 9; Matyszak 2011, 2-3). In July 2009 a leaked Cabinet memo, a summary of which was then itself leaked by *Wikileaks*, then reported that:

> Cabinet dismissed the order and noted that the [interim] injunction, "the effect of which was to reverse the sacrosanct land reform programme, amounted to blatant negation of the country's history and it's liberation struggle," [...] The memo directed the police to disregard the SADC injunction, based on the Cabinet position that the injunction was a result of Western interference (U.S. Embassy, Harare, 28th July 2008).

Thereafter, in 2010, after Patrick Chinamasa had lobbied his fellow SADC Ministers of Justice and Attorneys-General, the SADC Summit of Heads of State agreed to temporarily suspend the Tribunal and review its competences (Cowell 2013, 159). In 2012, finally, after suspending the Tribunal again, and after rejecting official recommendations that its powers actually be reinforced, the Summit eventually decided to restrict individual access to the Tribunal, and to strip it of its human rights jurisdiction. This move elicited the outrage of a range of international campaigners including Desmond Tutu (e.g. SADC Tribunal Rights Watch*,* 14th August 2012; Melber, 17th August 2012; Cowell 2013).

(iv) Analysis

One of the most striking aspects of *Campbell* was the relative ease with which such (predictable and indeed predicted) backlash could have been avoided by legal means. The ruling was hardly dictated by the 'letter of the law' (compare Alter 2014, 281). In a surprise to some observers, the court granted itself jurisdiction by pointing to the (rather vague) insistence in the SADC's Windhoek Treaty that states 'shall act in accordance with the principles...[of] human rights, democracy, and the rule of law' (Matyszak 2011). As conceded by Tazorora Musarurwa (2010, 11), the court's international legal assistant, 'conservative positivists may thus have problems with the approach taken by the Tribunal'. The court could, indeed, have decided to rule only on compensation and the ouster of the Zimbabwean courts. However, after failing to reach agreement about the issue right up until the day before the judgement, the majority (Justice Tshosa dissenting) eventually also ruled on racial discrimination (Zongwe 2009, 22). As counsel Jeremy Gauntlett (2010) explained, 'a striking aspect of the SADC main ruling in Campbell was that it ruled on all three of the attacks - and sustained each. Often courts will not do that, if one is dispositive'.

The content of this majority opinion was, moreover, clearly intended to signal the region's adherence to the 'global community of law', and (albeit to a lesser extent) to make a contribution to the 'common law of the world'. It justified its ruling on the ouster of the Zimbabwean courts by looking far beyond SADC Protocols - which the GOZ prayed in aid - by referencing the decisions of courts including the European Court of Human Rights (EctHR), Inter-American Court of Human Rights (IACHR), and the highest courts of the United Kingdom and South Africa (*Campbell v The Republic of Zimbabwe*, 2008, paras 37-40, 46-49; for 'dialogue' and the citation between the ECtHR and IACHR see Scribner 2015). More controversially it also rejected the GOZ's claims that land expropriation could not be understood as an issue of human rights and racial discrimination. The distinctive nature of post-colonial agrarian reform, the GOZ argued, would always ensure that one racial group must be indirectly but disproportionately affected (for analysis Zongwe 2009, 25; Ndlovu 2011, 13). Instead the Tribunal

accepted the applicants' invitation to treat racial discrimination as forbidden by *jus cogens:* a universally binding norm of international law that was reflected, *inter alia*, by the Universal Declaration of 1948, and International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (*Campbell v The Republic of Zimbabwe*, 2008, heads of argument for applicants, paras 130-141; *Campbell v The Republic of Zimbabwe*, 2008, paras 61-71).

This approach, however, ran directly counter to a deepening political consensus in the region that land must not be regulated by global legal norms. Since the advent of Fast Track Land Reform in Zimbabwe, it had in fact become increasingly illegitimate to argue that questions of land reform should be seen simply as an issues of (owners') human rights (I use 'illegitimate' here in the standard constructivist sense, see Finnemore 2009). A group of governmental and non-governmental 'norm entrepreneurs', with former South African President Thabo Mbeki at the forefront, had been able to successfully persuade legal and political elites across the region to accept the GOZ's 'patriotic history' narrative relating to land (for a comprehensive account see Alden and Anseeuw 2009, 110-2, 139-140, 143, 178). Mbeki's 2003 complaint - that the land issue had 'disappeared from public view', its place 'taken by the issue of human rights' - has since been echoed even by such liberal administrations as that in Botswana (Alden and Anseeuw 2009, 169; Nathan 2013, 885).

The Tribunal's assertive stance on this question contrasted strongly with that of a cohesive regional network of human rights activists. This networks has more consistently behaved as a 'shrewd political animal'. Its central node has been, arguably, Zimbabwe Lawyers for Human Rights (ZLHR). By the 2000s ZLHR had become the country's most prominent organisation of this kind (compare Dorman 2001, 160-162). Studiously avoiding the questions of rights and racial discrimination raised by Amendment 17 of 2005 - now an increasingly illegitimate topic in regional politics - it only challenged the Amendment's ouster clause at the UN. And it took the same issue to the African Commission on Human and Peoples Rights(ACHPR) alongside the SADC Lawyers Association (SADCLA) – an organisation which it provided with secretarial and logistical services (ZLHR, 2005a; 2005b, 3; N.d., 4; JAG, 2005; SADCLA, 2005, 11-12). Later, in 2012, SADCLA lobbied against the restructuring of the SADC Tribunal alongside the International Commission of Jurists (ICJ) - with whom ZLHR had affiliate status, and whose Africa Director (Arnold Tsunga) was ZLHR's former Executive Director (ZLHR 2005, 3; ICJ, SALC and SADCLA 2012). In this these organisations were also joined by the Southern African Litigation Centre (SALC), which has often collaborated with Tsunga and the ICJ on Zimbabwean issues (e.g. ICJ, PALU, SALC and SADCLA 2013). Interviews have amply confirmed the dense network of long-standing personal and institutional connections between SALC, ZLHR, SADCLA and the ICJ (Makanatsa Makonese, interview, 30th April 2012; Lloyd Kuveya, interview, 3rd

May 2012).

Crucially, moreover, all these organisations have enjoyed good connections with the ACHPR. SALC has 'very close' relationships with the Commissioners (Lloyd Kuveya, interview, 3rd May 2012). While ZLHR, for its part, has long had observer status with the Commission, and in 2005 had as many as seven cases against the GOZ before it simultaneously: a period when Zimbabwe had more cases against it than any other country (ZLHR 2005, 3; N.d., 1-4; Saki 2008, 74). Under such circumstances, of course, treating the land question in Zimbabwe as a human rights issue would have been likely to escalate Zimbabwe's (still) low-level resistance against the Commission into full-blown backlash (for Zimbabwean resistance to the ACHPR, described by a founder member of the ZLHR, see Saki 2008, 75). And, in fact, the Commission has long 'stressed the colonial element of the Zimbabwe situation'; once arguing (intriguingly), for instance, that 'the land question is critical and ... from a human rights perspective … has to be the prerogative of the government of Zimbabwe (ACHPR 2004, para 2; Murray 2011, 188). Therefore, when the *Campbell* farmers sought to appeal the restructuring of Tribunal to the African Court of Human Rights in 2013, the Commission refused to pass the case on (see Gauntlett and Pelser, 17th January 2013; Spies and Freeth, 5th March 2014)[6]. In rejecting the *Campbell* applicants' complaint, the Commission was acting as the European Commission once did in the 1960s and 1970s; building legitimacy for the EctHR by shielding it from rulings striking directly at member states' sovereign prerogatives (Madsen 2007, 144-152). SALC, who had sought to dissuade the Campbell litigants from taking the case to court, criticised the SADC Tribunal for not taking a similarly long-term approach towards safeguarding its institutional integrity. In 2013 Director Nicole Fritz reportedly argued, for instance, 'that the Tribunal shouldn't have handled such high impact and controversial cases from its inception but should rather have focused on building legitimacy in its rulings over matters which weren't as controversial. In this way states would learn to accept its authority' (SAFPI 2013; also Lloyd Kuveya, interview, 3rd May 2012).

The five judges that ruled on *Campbell*, however, were not drawn from these networks. Importantly, five judicial positions and that of the Registrar were sponsored by the German Government, and the European Union financed most SADC operating costs (Goeieman 20th July 2011; SADC 2012, 48)[7]. Whilst no judges came from states where white populations had retained the bulk of commercial farmland (Namibia, South Africa, and Zimbabwe). Only Onkemetse Tshosa, the Botswanan judge who had dissented on the issue of racial discrimination, had any prior record of public engagement with these

6 Two months previously SALC - supported by the ICJ, SADCLA and others - had approached the Commission asking for a simple advisory opinion on the matter; a move clearly devised to minimise confrontation between member states and new institutions (Open Society Initiative for Southern Africa, 4th August 2011; Pan African Lawyers Union and Southern Africa Litigation Centre, 26th November 2012).

7 For an analysis that shows some of the ways in which aid relationships require a modification of assumptions underpinning separation of powers games, see VonDoepp (2005).

issues; even being criticised by one Zimbabwean scholar for academic work that 'understate[d] the extent to which post-independent Zimbabwe has engaged in practices which violate international human rights law' (Zimudzi 2002, 2). Judge Rigoberto Kambovo from Angola has some experience with inter-judicial networking, but only in the fields of maritime law and combating transnational crime[8]. Judge Isaac Mtambo, from the Malawian Supreme Court of Appeal, was educated in Malawi, had been a Director of Private Prosecutions, and has spent his long and distinguished career climbing the domestic ranks. Charles Mkandiriwe, the Court Registrar, has however made it clear that he understood the problems the Tribunal faced as analogous to those confronting regional courts elsewhere - especially the European Court of Human Rights and the East African Court of Justice (EACJ) - with whose staff he was in regular 'dialogue' (Charles Mkandiriwe, interview, Windhoek, 22nd August 2011). Certainly, under Judge President Mondlane - one of Mozambique's most senior jurists - dialogue with other international courts became a priority for the Tribunal. Just months after *Campbell*, for instance, Mondlane completed the signing of a Memorandum of Understanding with the EACJ (EAC 21st November 2008, 8). This committed the two institutions to exchange programmes and the sharing of information, and led, for example, to a joint visit to the International Criminal Tribunal for Rwanda (ICTR) (ICTR October 2008, 7).

In the case of Judge Ariranga Pillay from Mauritius, however, evidence for the influence of the 'global community of law' is somewhat less speculative. Deeply enmeshed in international human rights networks, Pillay has been a Vice-Chairman of the UN Committee of Economic, Social and Cultural Rights, a drafter of reports for UN Committee for the Elimination of Racial Discrimination, a one-time fellow in human rights at the University of London, an honorary 'bencher' at Lincoln's Inn, and a regular speaker at human rights conferences across the globe. He was also, perhaps unsurprisingly, the only judge to dissent on costs, declaring that the 'exceptional' nature of the case justified 'the award of costs to the applicants in the interests of justice' (*Campbell v The Republic of Zimbabwe*, 2008, para 99). Alone amongst his brethren, once again, he has made a number of public statements about the case since the judgement. In a now well-known interview from 2011, for example - delivered between speeches on the topic to the Law Society of Namibia and South African Constitutional Court Alumni Association - Pillay implied that the Tribunal had accurately anticipated how Southern African states would react to their ruling: 'It [the Tribunal] gave off all the right buzz words, you know, 'democracy, rule of law, human rights' … they [member states] got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable' (Christie 19th August 2011). In 2013 he was even reported to have declared that the Tribunal's 'demise was predictable and inevitable'; clearly suggesting that Executive signalling had been ignored (SAFPI 2013). Pillay, finally, was dismissive of the growing

8 Unless otherwise indicated, biographical information about judges in the following paragraphs is drawn from their curriculum vitae, which in April 2014 were still downloadable from http://sadc-tribunal.org/docs/.

regional consensus about the special status of post-colonial land reform, criticising his own country for siding with Zimbabwe when it didn't have any of 'the same historical hangovers' (Christie 19th August 2011).

(b) *Sesana v The Attorney General* (2006)

2006 saw an equally dramatic confrontation between the courts and the Executive in Botswana. On the 13th December the High Court handed down judgement in the longest and most expensive case in the country's history. It was also the most controversial, with Survival International, a British indigenous rights NGO, using the lawsuit to condemn the human rights record of the government of Botswana; hitherto seen internationally as a beacon of liberal democracy in Africa.

(i) Historical context

The dispute in *Sesana* centered around the relocation of 'indigenous' San populations from the Central Kalahari Game Reserve (CKGR); a policy pursued as part of a strikingly ill-informed *mission civilisatrice* pursued by both colonial and postcolonial administrations (for the colonial period Silberbauer and Kuper 1966, 171-2; Russell 1976, 178-182; for contemporary continuities Nthomang 2004). As early as 1890, indeed - even before the coming of effective colonial rule - the San, who neither lived in villages not owned cattle, had been 'consigned to a peripheral, wild, uncontrolled nature in Tswana ideology' (Wilmsen 2002, 829). A century later these views had only become stronger; reinforced by spectacular developmental success of the Tswana elite, and by its welfarist orientation (see Saugestad 2001, 120-5).

The immediate background to the case, however, related to a wave of relocations of San from the CKGR dating from mid-1997. In the previous year soon-to-be-President Festus Mogae had referred to the inhabitants of the reserve as 'Stone Age creatures who must change, or otherwise, like the dodo, they will perish' (Good 2004, 16). In March 1997 parliament then voted 6,000,000 Pula (approximately $1.4 million) to develop a settlement for these 'nomadic' populations at New !Xade. Its stated objective was to facilitate the provision of social services. In May-June it moved decisively, resettling three-quarters of the Reserve's population (see R. Hitchcock 1999, 113-6; Hitchcock and Vinding 2001, 63; Zips-Mairitsch 2013, 306-7). Almost immediately controversy erupted over the sufficiency of consultation, information provided, (promised) compensation paid, and whether threats had been made about the use of force in future (Saugestad 2011, 41; Zips-Mairitsch 2013, 308-312).

Between 1997 and mid-2001 a coalition of international and Botswanan NGOs, and indigenous

rights organisations, attempted urgent negotiations with the government, advocating a new Management Plan for the Reserve. For reasons that are still hotly disputed, however, these negotiations had broken down by mid-2001 (compare Mogwe 2011 with Saugestad 2011). In October the government announced that game licenses would no longer be renewed, and services, including water, no longer be provided for those who had returned to the CKGR (Hitchcock and Vinding 2001, 67). In January 2002 (armed) police and DWNP staff removed water storage tanks, closed the last remaining borehole, separated some families, and dismantled (sometimes bulldozing) property; relocating all but a few households to the new resettlement villages (Saugestad 2011, 42; Zips-Mairitsch 2013, 314). The government blamed Survival International (SI) for its change of heart, reacting to a confrontational advocacy campaign which accused it of wanting to extract 'conflict diamonds' from the newly-vacated lands in the Reserve (Taylor and Mokhawa 2003).

(ii) ***Sesana***

NGO supporters of the San were now left with no choice but to litigate a dispute striking at the heart of 'formative collective identity' in Botswana (Hirschl 2008, 98). The widespread initial 'expectation [was] that land rights would be introduced into the case as a more explicit claim for ownership, not only for lawful occupation'; a direct challenge to the government's oft-repeated view that 'all Batswana are indigenous to the country', and thus equal in their entitlements to land (Saugestad 2011, 45). In the event, however, the litigants' final list of demands were more modest (at least on first look). They asked the Court to rule on four issues:

> '(a) whether the termination with effect from 31st January 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and constitutional.
>
> (b) whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve;
>
> (c) whether subsequent to 31st January 2002 the Appellants were (i) in possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve; (ii) deprived of such possession by the Government forcibly or wrongly and without their consent.
>
> (d) whether the Government's refusal to: (i) issue special game licences to the Appellants; and (ii) allow the Appellants to enter into the Central Kalahari Game Reserve unless they are issued with a

permit is unlawful and constitutional' (*Sesana v The Attorney General* 2006, judgement of Dibotelo, paragraph 3).

There were a number of striking aspects of how the Court handled this case. The first was the speed with which it defeated the expectations of the government's legal team. Hearings only began in earnest in 2004, following a two-year delay caused by an appeal against an initial judgement, and numerous funding and logistical difficulties. Lead counsel for the state (Sidney Pilane) was confident that the case would be won within three months. Two years later, however, it had ended in what had to be reckoned as a humiliating defeat. The High Court found for the respondents only on the constitutionality of cutting-off and failing to restore services (for an overview Saugestad 2006). Every issue, however, was decided-upon differently by the three judges' separate opinions. This was thus clearly not a case of courts seeking safe harbour in the 'letter of the law' (Alter 2014, 281). As in *Campbell*, that is, the judges were presented with a range of legally acceptable options.

Easily the most dramatic of the judges' conclusions was Judge Dow's finding that, for the first time in the country's history, the government should be ordered to treat different ethnic groups differently. Finding that the (locally contested) international law concept of 'indigenous peoples' was relevant to Botswana, she found that the 'Basarwa [San]':

> 'and to some extent the Bakgalagadi, belong to an ethnic group that is not socially and politically organised in the same manner as the majority of other Tswana speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the Applicants' situation' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 186).

These findings were accompanied by forthright criticisms of the Executive:

> 'this is a case that questions the meaning of 'development' and demands of the respondent to take a closer look at its definition of that notion. One of colonialism's greatest failings was to assume that development was, in the case of Britain, Anglicising, the colonised [...] Botswana has a unique opportunity to do things differently' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 272; compare Dow 2009).

Even taken by itself, however, the final ruling of the Court as a whole represented a startling rebuke to the government. Despite finding in its favour on services, the Court nonetheless found that the

applicants had been in lawful possession of their lands before 2002; had been unlawfully deprived of these lands; had been unlawfully refused special game licenses; and had been unlawfully refused permits to enter the Reserve (Saugestad 2006, 1-2).

(iii) Backlash

In the 8 years since the case there has, as yet, been very little indeed that could be characterised as compliance. In the immediate aftermath of the case, and whilst still in the glare of the international media, the government announced that it would not be appealing the judgement (see Zips-Mairitsch 2013, 354-5). Since then, however, it has responded with 'restrictive interpretation[s]' and 'considerable ... foot-dragging' (Saugestad 2011, 50). It announced that only named applicants could return to the CKGR without permits, and even they would need identity documents. Domestic animals and permanent structures were banned. Water from outside would be allowed if transported at the applicants' own expense. And applications for game licenses would have to be sent to the DWNP for individual assessment. As of March 2012 not a single one had been granted (Saugestad 2006, 2; Zips-Mairitsch 2013, 354-6). After a follow-up case that temporarily prevented relocations from an 'unrecorded settlement' in Ranyane - where the applicants were also represented by Gordon Bennett, the (British) advocate in *Sesana* - government ensured relocation by progressively denying basic services; tactics 'clearly calculated to make the court order meaningless' (Morima 22nd December 2014; compare also the contrasting interpretations in Lee, May 22nd 2013; BOPA, 19th June 2013). Then, in 2013, Bennett was placed on a 'visa list' for Botswana, alongside South African nationalist firebrand Julius Malema; effectively preventing him from entering the country (e.g. BOPA 30th July 2013; SAPA 21st November 2014).

All these instances of 'deliberately failing to abide by court rulings' were accompanied by the 'bypassing [of] judicial institutions as channels of adjudication'; a related practice that Vondoepp and Ellett (2011, 152) also characterise as a 'general institutional assault' on the judiciary. Under new President Ian Khama (from 2008) the government has declared its openness to 'dialogue' with the *Sesana* applicants, but only on the condition that 'outsiders' are not involved (Motlaloso, 13th June 2008). The results have, nonetheless, been 'dismal' (Saugestad 2011, 52). A 'Central Kalahari Game Reserve Consultation Process' has comprised annual meetings with little to show for them (The Government of Botswana et al., June 3rd 2010; Saugestad 2011, 51; Zips-Mairitsch 2013, 357-8).

There has also been some speculation in Botswana that backlash against *Sesana* has also been responsible for 'personnel speculation' and the 'packing [of the] court with supporters while purging it of

opponents' (VonDoepp and Ellett 2011, 152-3). After Unity Dow's retirement in 2008, for example, a leading Botswanan human rights lawyer, Duma Boko - whose firm litigated *Sesana* - publicly praised her bold stance on the CKGR before asking whether she had been 'pushed or undermined' by the government (Segwai, 14th November 2014). Since Boko is also the country's leading opposition politician, such claims must, however, be approached with a great deal of scepticism. Caution must also be used when interpreting the elevation to Chief Justice in 2010 of Maruping Dibotelo: the only *Sesana* judge who found for the government on all counts, and who (rather irregularly) had also presided over the initial case which the applicants were appealing against. Although some critics in the Botswana Law Society used this occasion to criticise the 'anti human-rights' mindset they believed Dibotelo had displayed during *Sesana*, seniority has generally been the Executive's primary consideration when making such appointments (e.g. Piet, 3rd February 2010; for criticism of the appointments procedure Law Society of Botswana 2012a). There is little ground to suppose that Dibotelo's judgement in *Sesana* was of determinate significance.

What *is* clear, nonetheless, is that non-compliance with CKGR rulings has been one of the foremost charges that the organised legal profession has levelled against the government over the last five years, during a period when it has been agitating for constitutional reform (cf. Ganetsang, 21st November 2011). Its reform proposals have been informed by and developed against a background of unprecedented confrontation with an increasingly authoritarian Executive (for authoritarianism under Khama see Good 2010). Botswanan constitutional reformers now explicitly seek to signal a desire 'to be received or respected or esteemed by … [the] community of nations'; arguing, for example, that 'globalisation' is 'one factor militating against the use of culture as a reason for not conforming to Universal Human Rights', and bemoaning how the 'judicial activism' needed to 'keep up with current thinking' is choked by 'inherent flaws in the appointments process' (Law Society of Botswana 2012b, 5-6). Such tensions have only (and predictably) been exacerbated by apparent non-compliance with *Sesana.*

(iv) Analysis

This Botswanan debate over constitutionalism was reflected by the three separate opinions in the CKGR case. Not only did the judges reach different conclusions, but they did so by appealing to very different legal constituencies. Justice Dibotelo, perhaps unsurprisingly, made reference almost exclusively to the positive law of Botswana. Justice Mpaphi Phumaphi, meanwhile, took a different approach. He censured the Executive (albeit more cautiously than Justice Dow) but did so by basing his reasoning on decisions made by other common law courts. His decisive ruling against the applicants on

the issue of services, for example, was grounded in the doctrine of legitimate expectations. This doctrine was invented by the senior British jurist Lord Denning in 1969 when Master of the Rolls. Put briefly, it holds governments should not violate express promises to their citizens or reasonable expectations which their actions create. And has been used extensively by liberal public and administrative lawyers in Britain and South Africa to combat bureaucratic discretion (e.g. Hlophe 1987; Forsyth 1988; Quinot 2004). Networks of these lawyers mobilised around *Sesana*. Christopher Forsyth, for example - a leading British/South African follower of Denning's - delivered a lecture at the University of Botswana just months before the judgement in *Sesana* was due (see Forsyth 1999). He was concerned by 'activist' trends elsewhere in the common-law world. His lecture, accordingly, was devoted to 'Some Pitfalls for Botswana to Avoid'. It warned against using the doctrine of legitimate expectations as an 'inchoate substitute for fairness' (see Forsyth 2006, 5). Phumaphi then referenced Forsyth in *Sesana* to make exactly this argument, re-affirming what he saw as common-law precedent (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 55-6)[9].

On the question of lawful occupation, by contrast, Phumaphi found in the applicants' favour. He did this, once again, by referring to common law jurisprudence, citing the Australian High Court's most famous judgement: *Mabo and Others v The State of Queensland* (1992) (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 69-79; Stephenson and Ratnapala Eds. 1993). This, famously, had been the case which held that 'aboriginal title' had not been extinguished when the British Crown claimed possession of relevant lands. It ruled that the infamous doctrine of 'terra nullius' (nobody's land), which the British had used to justify their claims, no longer accorded, in Justice Brennan's words, with 'the expectations of the international community' and the 'contemporary values of the Australian people' (van Krieken 2000, 64). Like *Sesana* in Botswana*, Mabo* signalled (some) Australian's judges' desire to reconcile common-law jurisprudence with the new rights-based brand of constitutional interpretation now characteristic of the 'global community of law' (see Young 2009, 34, 53; for analysis of Phumaphi's use of *Mabo* see Ng'ong'ola 2007).

In contrast to Justice Phumaphi, but like Judge Pillay in *Campbell*, Unity Dow justified her decisions primarily on the basis of international human rights - looking far beyond the bounds of the common-law world. She justified this 'activist' approach by citing U.S. Supreme Court doctrines of 'generous construction' that had been referenced in *Dow v the Attorney General* (1991). This had previously been the best-known case in the recent judicial history of Botswana, and one in which Dow herself had been the litigant (see Dow 1995). Although she herself was a Motswana, the 1982 and 1984

9 Since the applicants produced no evidence of actually having expected even a consultation, Phimaphi was able to rule the termination of services lawful and their restoration unnecessary (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 27, 30-31).

amendments to the Citizenship Act had effectively denied her children citizenship rights on the grounds that her husband was a citizen of the United States. She saw the lawsuit as a 'test case' with crucial implications for 'implementing change' for African women (Pfotenhauer and Dow 1991, 104-5). It was the first civil action to allege that parliament had violated human rights and exceeded its constitutional powers (Pfotenhauer and Dow 1991, 101). Its success coincided with a comparative explosion in Botswanan constitutional litigation (see Fombad 2011, 18). Now, in *Sesana*, Dow made the similarly path-breaking finding that 'the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples''. This was an opinion outrageous to the government that Dow justified solely by reference a leading UN expert, and not to the laws of Botswana or the international conventions to which it was a party (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 117). On the issue of service restoration, moreover, she interpreted the doctrine of legitimate expectations in just the 'activist' manner that Christopher Forsyth had sought to warn against; finding not only that the applicants would have been expected to be consulted about the termination of services, but also that they would have expected certain specific services 'essential' for their 'survival' to have been continued (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 228; for critique from a common-law perspective see Ng'ong'ola 2007, 109-110).

Like Judge Pillay, Dow had also long been a part of international human rights networks. In the 1980s, soon after completing her legal training in Edinburgh, she was responsible for creating many of Botswana's first organisations dedicated to women's rights (van Allen 2007, 476; Bauer and Ellett 2016). As a result, by 199,1 she was able to attract support from the Swedish International Development Agency and various Southern African and American NGOs for her challenge against the Citizenship Act (Dow 1995, preface). Then, in her subsequent career on the bench, as summarised by Duma Boko, she became a judge 'who was willing to listen to arguments that to some conservative judges would seem to be outrageous. In the CKGR case, I think she brought it home in the plainest manner' (in Segwai, 14th November 2008). *Sesana,* indeed, signalled to an international audience that Dow was Botswana's leading member of the 'global community of law'; a membership she dramatised in a (pointedly titled) novel published that same year: *The Heavens May Fall* (2006)[10]. Upon her retirement, in 2008, she only improved this international reputation. She won, for example, the Legion d'Honneur and a Prominent Woman in International Law Award, and even taught a seminar at Columbia Law School dedicated to the issues raised by the *Sesana* case (Columbia Law School, October 29th 2009; Dow 2009; Muluzi 23rd March 2011).

10 The book, according to its editors, is an 'examination of an African culture dealing with the pressures of colonisation and globalisation' (http://www.spinifexpress.com.au/Bookstore/book/id=190/ accessed 12th August 2015). The title, of course, alludes to the legal Latin dictum *fiat justitia ruat caelum* (Let Justice Be Done Though The Heavens May Fall): a motto more popular with lawyers than judicial politics scholars.

Although I have suggested that this global focus may have posed some thereat to the institutional integrity of Botswanan judiciary, and helped worsen relations with the Executive, it clearly did not, however, damage Dow's own personal relations with the government. After returning full-time to public life in Botswana, Dow in fact joined the ruling Botswanan Democratic Party (BDP) in 2012; provoking much debate in Botswana. Once again prominent lawyers associated with opposition parties were responsible for much of this speculation, asking whether the BDP had in fact sought to forge connections with Dow whilst she was still on the bench; a reaction, they implied, to her famously independent judgements (e.g. Seitshiro 19th March 2012). Whatever the truth of the matter, it is clear that the BDP and President Ian Khama have attempted to use Dow's global cultural capital, which *Sesana* only increased, to re-legitimise their rule. Often described in the media as a 'favourite' of Khama's, during his Presidency Dow has in fact been the *only* female politician to benefit from laws that allow women to be appointed to parliament as Specially Elected Members (*Midweek Sun*, 23rd July 2012; Bauer and Ellett 2016). Her recent trajectory, in short, neatly illustrates how judges can be inserted in domestic and global networks that not only co-exist but interact (see generally Dezalay 2015).

4. Conclusion

In both the *Campbell* and *Sesana* cases surveyed above backlash against the court was both predictable and easily avoidable through legal means. In *Campbell,* moreover, activist networks even mobilised in advance of the judgement to prevent such backlash from taking place. Yet in both cases Executive signalling towards the court clearly failed to have the 'chilling effect' anticipated by strategic models of judicial decision-making. Judges in fact decided the cases in a range of ways, ranging from wholesale agreement with the government's position (Justice Dibotelo), to a full-frontal challenge to the government's vision of 'formative collective identity' (Judge Pillay and Justice Dow). This paper has provided indirect and speculative evidence that the degree of insertion in global judicial networks functions as an independent variable in these cases, helping to explain such variation. That it would function thus in this particular class of cases - high-profile human rights cases allowing courts to signal desires for membership in the 'global community of law' - is unsurprising. Cases such as these are the only ones in which critics of judicial network scholarship have conceded (albeit implicitly) that networking may have significant effects. Further research would of course be needed to validate these conclusions; research that grapples with the formidable practical difficulties associated with identifying and mapping networks on a global scale.

Bibliography

ACHPR [African Commission of Human and Peoples' Rights]. "Annex II: Executive Summary of the Report of the Fact-finding Mission to Zimbabwe 24th to 28th June 2002." EX.CL/109 (V). ACHPR: 2004. At: http://www.swradioafrica.com/Documents/ACReport.htm [accessed 6th August 2015].].

Ackerman, Bruce. "The Rise of World Constitutionalism." *Virginia Law Review* 83 (1997) 771-797.

Alden, Chris and Ward Anseeuw. *Land Liberation and Compromise in Southern Africa.* Basingstoke: Palgrave Macmillan, 2009.

Alexander, Jocelyn. *The Unsettled Land: State-making and the Politics of Land in Zimbabwe 1893–2003.* Oxford: James Currey, 2006.

van Allen, Judith. "Dow, Unity (1959-)." *Encyclopedia of Activism and Social Justice*. Eds. Gary L. Anderson and Kathryn G. Herr. Thousand Oaks: SAGE, 2007. 476.

Alter, Karen. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton: Princeton University Press, 2014.

Alter, Karen, James Gathii and Laurence Helfer. "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences." *Duke Law School Public Law & Legal Theory Series No. 2015-19* (2015). Available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship [accessed 6th August 2015].

Bailey. Lucy and Andrew Thompson. *Mugabe and the White African* [documentary film]. Arturi Films: 2009.

Bauer, Gretchen and Rachel Ellett. "Botswana: Delayed Indigenization and Feminization of Judiciary." *Gender and the Judiciary in Africa: From Obscurity to Parity?* Eds. Gretchen Bauer and Josephine Dawuni. New York: Routledge, forthcoming in 2016.

Burley, Anne-Marie. "Toward an Age of Liberal Nations." *Harvard International Law Journal* 33:2 (1992): 393-405.

Bentele, Ursula. "Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law." *Georgia Journal of International and Comparative Law* 37 (2009): 219-240.

Black, Ryan C. and Lee Epstein. "(Re-)Setting the Scholarly Agenda on Transjudicial Communication." *Law & Social Inquiry* 32:3 (2007): 791-807.

BOPA [Botswanan Press Agency]. "Government clarifies Ranyane issue." *Daily News* 19th June 2013.

- Parliament rejects Bennet motion." *Daily News* 30th July 2013.

Brett, Peter. "Explaining South Africa's Bill of Rights: an interpretive approach." *Commonwealth and Comparative Politics* 52:3 (2014): 423-442.

- 'Cause lawyers sans frontières: juristes sud-africains et judiciarisation du politique en Afrique australe.' *Politique Africaine* 138:2 (2015):

Breyer, Stephen. “Keynote Address.” *Proceedings of the Annual Meeting (American Society of International Law)* 97 (2003): 265-268.

Buxbaum, Hannah. “From Empire to Globalization and Back? A Post-Colonial View of Transjudicialism.” *Indiana Journal of Global Legal Studies* 11 (2004): 183-189.

Carozza, Paolo. ““My Friend Is a Stranger”: The Death Penalty and the Global Ius Commune of Human Rights.” *Texas Law Review* 81 (2003): 1031-1089.

Chan, Stephen. *Robert Mugabe: A Life of Power and Violence.* Ann Arbor: University of Michigan Press, 2003.

Christie, Sean. “Killed off by 'kings and potentates'.” *Mail and Guardian* 19th August 2011. Availbale at: http://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates [accessed 19th April 2014].

Columbia Law School. “Unity Dow: Lawyer, Judge, Human-Rights Activist, and Now Columbia Law School Professor.” Press release, 29th October 2009. Available at: https://www.law.columbia.edu/media_inquiries/news_events/2009/october2009/unitydow [accessed 19th April 2014].

Cooke, Robin. “The Road Ahead for the Common Law.” *The International and Comparative Law Quarterly* 53:2 (2004): 273-285.

Cotterrell, Roger. *Law's Community: Legal Theory in Sociological Perspective*. Oxford: Clarendon Press, 1995.

Cowell, Frederick. “The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction.” *Human Rights Law Review* 13:1 (2013): 153-165.

Dezalay, Sara. “Introduction.” *Politique Africaine* 138:2 (2015):

Dorman, Sara Rich. “Inclusion and exclusion: NGOs and politics in Zimbabwe.” Unpublished DPhil thesis: University of Oxford, 2001.

Dow, Unity. *The Citizenship Case. The Attorney General of The Republic of Botswana vs Unity Dow: Court Documents, Judgements, Cases and Materials Compiled and Edited by Unity Dow.* Gaborone: Lentswe La Lesedi, 1995.

- *The Heavens May Fall*. Cape Town: Double Storey, 2006.

- “Through Their Eyes: Of Diamond Rings and Cows - Diamonds for Love and Cows are for?” Nelson Mandela Lecture, The Hawke Centre, University of South Australia, 16th September 2009. Available at: http://w3.unisa.edu.au/hawkecentre/nml/2009nml_unitydow.asp [accessed 20th April 2014].

EAC. “EACJ and SADC Tribunal Sign MOU.” *e-EAC* 19 (2008): 8. Available at: http://www.eac.int/news/index.phpoption=com_docman&task=doc_view&gid=109&Itemid=159 [accessed 19th April 2014].

Ellett, Rachel L. *Pathways To Judicial Power In Transitional States: Perspectives From African Courts*. New York: Routledge, 2013.

Ferejohn, John and Barry Weingast. “Limitation of Statutes: Strategic Statutory Interpretation.”

Georgetown Law Journal 80:3 (1992): 565-82.

Finnemore, Martha. “Legitimacy, Hypocrisy, and the Social Structure of Unipolarity.” *World Politics* 61:1 (2009): 58-85.

Fombad, Charles. “The Republic of Botswana: Introductory Note.” *Oxford Constitutions of the World.* Oxford: Oxford University Press, 2011. Available at: http://oxcon.ouplaw.com/view/10.1093/law:ocw/law-ocw-cm653.document.1/law-ocw-cm653?rskey=OLXdHo&result=27&prd=OCW [accessed 3rd June 2014].

Forsyth, Christopher. “The Provenance and Protection of Legitimate Expectations.” *The Cambridge Law Journal* 47:2 (1988): 238-260.

- “Lord Denning and Modern Administrative Law.” *Denning Law Journal* 14 (1999): 57-70.

- “The Protection Of Legitimate Expectations: Some Pitfalls For Botswana To Avoid.” *Botswana Law Journal* 5 (2006): 5-16.

Freeth, Ben. *Mugabe and the White African.* Oxford: Lion UK, 2011.

Ganetsang. Godfrey. “The time is nigh for constitutional reform.” *Sunday Standard* 21st November 2011.

Gauntlett, Jeremy. “The Lie Of The Land: Law And Land Seizure In Zimbabwe 1890 - 2010.” The Ninth Mofokeng Lecture, Maseru, 15th October 2010b. Available at: http://www.swradioafrica.com/pages/lawandland191010.htm [accessed 20th April 2014].

- “A Court Too Far? Regional Courts In Southern Africa And Europe.” *Advocate* 25:3 (2012): 34-38.

Gauntlett, Jeremy and Frank Pelser. “Luke Tembani and Ben Freeth's submission to the African Commission.” *PoliticsWeb* 17th January 2013. Available at: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=351130&sn=Detail&pid=71619 [accessed 19th April 2014].

Gely, Ralph and Pablo.T. Spiller. “A Rational Choice Theory of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan.” *International Review of Law and Economics* 12 (1992): 45-67.

Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press, 2003.

Goeieman, Fred. “Why is there no access to justice in SADC.” *Namibian Sun* 20th July 2011.

Good, Kenneth. *Bushmen and Diamonds: (Un)Civil Society in Botswana, Discussion Paper 23 (NAI Discussion Papers).* New York: Nordic Africa Institute, 2004.

- “The Presidency of General Ian Khama: The Militarization of the Botswana 'Miracle'.” *African Affairs* 109:435 (2010): 315-24.

Government of Botswana et al. “Joint Press Statement from The Government of Botswana, the CKGR Residents' Committee and the CKGR Non-Governmental Organisations' Coalition on The Central

Kalahari Game Reserve Consultation Process.” June 3rd 2010. Available at: http://www.ditshwanelo.org.bw/press_2010-june03.html [accessed 29th June 2014].

Hafner-Burton, Emilie, Miles Kahler and Alexander. Montgomery. “Network analysis for international relations.” *International Organization* 63:3 (2009): 559-92

Helfer, Laurence. “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes.” *Columbia Law Review* 102 (2002): 1832-1911.

Helfer, Laurence and Anne-Marie Slaughter, “Toward a Theory of Effective Supranational Adjudication.” *Yale Law Journal* 107 (1997): 273-392.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, 2004.

- “The Judicialization of Mega-Politics and the Rise of Political Courts.” *Annual Review of Political Science* 11:1 (2008): 93-118.

Hitchcock, Robert K. “A chronology of major events relating to the Central Kalahari Game Reserve.” Botswana Notes and Records 31 (1999): 105-117.

Hitchcock, Robert K. and Diana Vinding. “A chronology of major events relating to the Central Kalahari Game Reserve II: an update.” Botswana Notes and Records 33 (2002): 61-71.

Hlophe, John. “Legitimate Expectation and Natural Justice: English, Australian and South African Law.” *South African Law Journal* 105 (1987): 165-178.

Hondora, Tawenda. "The Establishment of the SADC Tribunal: Troubled Beginnings." Unpublished manuscript. 2010. Available at: SSRN: http://ssrn.com/abstract=1727342. [accessed 14th April 2014].

ICG. *Blood and Soil: Land, Politics and Conflict Prevention in Zimbabwe and South Africa.* Brussels: International Crisis Group Press, 2004.

ICJ, SALC and SADCLA [International Commission of Jurists, Southern African Litigation Centre, and SADC Lawyers' Association]. “SADC Tribunal - Justice Denied.” 22nd August 2012. At: http://www.mikecampbellfoundation.com/page/sadc-tribunal-justice-denied-salc [accessed 19th April 2014].

ICJ, PALU, SALC and SADCLA [International Commission of Jurists, Pan-African Lawyers' Union, Southern African Litigation Centre, and SADC Lawyers' Association]. “Joint ICJ, PALU, SADC LA and SALC Statement on the Arrest and Continued Detention of Beatrice Mtetwa.” 18th March 2013. At: http://www.southernafricalitigationcentre.org/2013/03/18/joint-icj-palu-sadc-la-and-salc-statement-on-the-arrest-and-continued-detention-of-beatrice-mtetwa/ [accessed 19th April 2014].

ICTR. *ICTR Newsletter* October 2008. Available at: *www.unictr.org/sites/unictr.org/files/news/newsletters/oct08.pdf* [accessed 19th April 2014].

JAG [Justice for Agriculture]. “Communiqué on the Constitutional Amendment (No. 17) Act.” 9th September 2005. Available at: http://archive.kubatana.net/html/archive/agric/050909jag.asp?sector=LANDR&year=2005&range_start=1 [accessed 19th April 2014].

Kahler, Miles. "Networked Politics: Agency, Power, and Governance." *Networked Politics: Agency, Power, and Governance*. Ed. Miles Kahler. Ithaca: Cornell University Press, 2009. 1-22.

Kapiszewski, Diana. "Tactical Balancing: High Court Decision Making on Politically Crucial Cases." *Law and Society Review* 45:2 (2011): 471-506.

Karpik, Lucien and Halliday, Terence C. "The Legal Complex" *Annual Review of Law and Social Science* 7 (2011): 217-236.

Kersch, Ken I. "The justice as diplomat: the foreign policy frameworks behind the US supreme court's new globalism." *Global Democracy and its Difficulties*. Eds. Anthony Langlois and Karol Edward Soltan. Abingdon: Routledge, 2009. 95-111.

Kibble, Steve. "Zimbabwe Between the Referendum and the Elections." *Strategic Review for Southern Africa* 35:1 (2013): 93-117.

Kirby, Michael. "International Law - The Impact on National Constitutions." *American University International Law Review* 21:3 (2006): 327-364.

- "To Judge is To Learn." *Harvard International Law Review Online* 48 (2007): 36-47.

Koh, Harold. "Why Do Nations Obey International Law?" *The Yale Law Journal* 106:8 (1997): 2599-2659.

van Krieken, Robert. "From Milirrpum to Mabo: The High Court, Terra Nullius and Moral Entrepreneurship." *University of New South Wales Law Journal* 23:1 (2000): 63-104.

Law, David and Wen-Chen Chang. "The Limits of Global Judicial Dialogue." *Washington Law Review* 86:3 (2011): 523-577.

Law Society of Botswana. *Position Paper on Appointment of Judges*. Gaborone: Law Society of Botswana, 2012a. Available at: http://www.lawsociety.org.bw/download.php [accessed 15th June 2014].

- "Report On Conference On Constitutional Reforms In Botswana May 2012: The Constitution of Botswana, Is It Time For Reform?" Gaborone: Law Society of Botswana, 2012b. Available at: http://www.lawsociety.org.bw/download.php [accessed 15th June 2014].

Lee, Richard. "Botswana continues fight to forcibly move San." *Open Society Initiative for Southern Africa* 22nd May 2013. Available at: http://africajournalismtheworld.com/2013/05/22/botswana-continues-fight-to-forcibly-move-san/ [accessed 29th June 2014].

Llanos, Mariana, Cordula Tibi Weber, Charlotte Heyl, and Alexander Stroh. "Informal Interference in the Judiciary in New Democracies." *GIGA Working Papers*. *245/2014*. Leibniz-Institut für Globale und Regionale Studien: GIGA (German Institute of Global and Area Studies), 2014. Available at: http://www.giga-hamburg.de/en/system/files/publications/wp245_llanos-weber-heyl-stroh_0.pdf [accessed 6th August 2015].

Lund, Christian and Catherine Boone. "Introduction: Land politics in Africa: constituting authority over territory, property and persons." *Africa* 83:1 (2013): 1-13.

Madsen, Mikael Rask. "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics." *Law and Social Inquiry* 32:1 (2007): 137-159.

Marongwe, Nelson. "Interrogating Zimbabwe's Fast Track Land Reform and Resettlement Programme: a focus on beneficiary selection." Unpublished PhD thesis: University of the Western Cape, 2008.

Matyszak, Derek. "Creating a Compliant Judiciary in Zimbabwe, 2000-2003." *Appointing Judges in an Age of Judicial Power.* Eds. Malleson, Kate and Peter H. Russell. Toronto: University of Toronto Press, 2006. 331-354.

- "The Dissolution of the SADC Tribunal." Unpublished manuscript. 2011. Available at: http://archive.kubatana.net/docs/demgg/rau_dissolution_sadc_tribunal_110905.pdf [accessed 14th April 2014].

Meierhenrich, Jens. "Judicial Networks." *Global Democracy and its Difficulties*. Eds. Anthony Langlois and Karol Edward Soltan. Abingdon: Routledge, 2009. 82-94.

Melber, Henning. "Save the SADC Tribunal." *The Namibian* 17th August 2011.

Midweek Sun. "Dow against Kgotlele in Kgatleng West." 23rd July 2012.

Miller, Russell A. "Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany." *Washington and Lee Law Review* 61 (2004): 587-662.

Mogwe, Alice. "Human Rights Struggles. Where Social Conflicts and Confrontations are Negotiated - The Case of the Displacement of 'Basarwa' from the Central Kalahari Game Reserve in Botswana." *The Governance of Legal Pluralism: Empirical Studies from Africa and Beyond.* Eds. Werner Zips and Markus Weilenmann. Berlin: LIT, 2011. 163-179.

Moore, Donald. *Suffering for Territory*: *Race*, *Place, and Power in Zimbabwe*. Durham, N.C. and London: Duke University Press, 2005.

Morima, Ndulamo Anthony. "What sin has Basarwa & Bakgalagadi committed?" *Weekend Post* 22nd December 2014.

Motlaloso, Stryker. "Tears as Khama gets tough on CKGR." *Mmegi* 13th June 2008.

Mtisi, Joseph, Munyaradzi Nyakudya, and Teresa Barnes. "Social and Economic Developments During the UDI Period." *Becoming Zimbabwe: A History from Pre-Colonial Period to 2008.* Eds. Brian Raftopoulos and Alois Mlambo. Harare: Weaver Press, 2009. 115-140.

Muluzi, Kali. "The many facets of Unity Dow." *Sunday Standard* 24th March 2011.

Murray, Rachel. "The African Union (AU) Approach to Land Issues." *Southern Africa Development Community Land Issues: a New, Sustainable Land Relations Policy.* Ed. Ben Chigara. London: Routledge, 2011. 184-197.

Nathan, Laurie. "The Disbanding of the SADC Tribunal: A Cautionary Tale." *Human Rights Quarterly* 35:4 (2013): 870-892.

Ndlovu, Lonias. "Following the NAFTA Star: SADC land reform and investment protection after the

Campbell litigation.” *Law, Democracy & Development* 15 (2011): 59-89.

Ng'ong'ola, Clement. “Sneaking Aboriginal Title into Botswana's Legal System through a Side Door: Review of Sesana and Others v. the Attorney General.” *Botswana Law Journal* 6 (2007): 103-123.

Nthomang, Keitseope. “Relentless Colonialism: The Case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana.” *The Journal of Modern African Studies* 42:3 (2004): 415-435.

Open Society Initiative for Southern Africa. “Legal bodies unite to save SADC Tribunal.” 4th August 2011. Available at: http://www.osisa.org/law/regional/legal-bodies-unite-save-sadc-tribunal [accessed 19th April 2014].

Pan African Lawyers Union and Southern Africa Litigation Centre. “African Human Rights Court Asked To Rule On Legality Of Sadc Tribunals Suspension." 26th November 2012. Available at: http://www.southernafricalitigationcentre.org/2012/11/26/press-release-african-human-rights-court-asked-to-rule-on-legality-of-sadc-tribunals-suspension/ [accessed 19th April 2014].

Pfotenhauer, Linda and Unity Dow. “An Interview With Unity Dow.” *Botswana Notes and Records* 23 (1991): 101-105.

Piet, Bame. “Dibotelo replaces Nganunu.” *Mmegi* 3rd February 2010.

Pilossof, Rory. *The Unbearable Whiteness of Being. Farmers' Voices from Zimbabwe*. Cape Town: UCT Press, 2012.

Quinot, Geo. “Substantive Legitimate Expectations in South African European Administrative Law.” *German Law Journal* 5 (2004): 65-85.

Raftopoulos, Brian. “The Crisis in Zimbabwe: 1998-2008.” *Becoming Zimbabwe: A History from Pre-Colonial Period to 2008*. Eds. Brian Raftopoulos and Alois Mlambo. Harare: Weaver Press, 2009. 201-232.

Ranger, Terrence. “Nationalist Historiography, Patriotic History and the History of the Nation: The Struggle over the Past in Zimbabwe.” *Journal of Southern African Studies* 30:2 (2004): 215-234.

Raustiala, Kal. “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law.” *Virginia Journal of International Law* 43:1 (2002): 1-93.

Rogers, James. “Information and Judicial Review: A Signalling Game of Legislative-Judicial Interaction.” *American Journal of Political Science* 45:1 (2001): 84-99.

Russell, Margo. “'Slaves or Workers'? Relations between Bushmen, Tswana, and Boers in the Kalahari.” *Journal of Southern African Studies* 2:2 (1976): 178-197.

SADC [Southern African Development Community]. *Report of the Executive Secretary: Activity Report of the SADC Secretariat 2011-2012*. Gaborone: SADC Secretariat, 2012. Available at: http://www.sadc.int/files/1613/7243/4333/SADC_ES_Report_2011-2012_web.pdf [accessed 19th April 2014].

SADCLA [SADC Lawyers' Association]. *The Report of the President of the SADC Lawyers' Association to the Annual General Meeting*. Windhoek: SADCLA, 17th-18th June 2005. At:

http://www1.umn.edu/humanrts/research/2005%20SADC%20AGM%20PresidentReport.pdf [accessed 19th April 2014].

SADC Tribunal Rights Watch. "Desmond Tutu Joins Save the SADC Tribunal Campaign." 14th August 2012. At: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=318877&sn=Detail&pid=71654 [accessed 19th April 2014].

SAFPI [South African Foreign Policy Initiative]. "The SADC Tribunal: removing the scales of justice: 1st March 2013. Conference summary." Pretoria/Tshwane: 2013. Available at: http://www.safpi.org/events/sadc-tribunal-removing-scales-justice-1-march-2013-pretoria [accessed 19th April 2014].

Saki, Otto. "Celebrating minor victories? Zimbabwe at the African Commission on Human and Peoples' Rights." *Africa's Long Road To Rights*. Ed. Hakima Abbas. Oxford/Nairobi: Fahamu, 2008. 70-79.

SAPA [South African Press Agency]. "Botswana denies vendetta against EFF after visa restrictions." *Mail and Guardian* 21st November 2014.

Saugestad, Sidsel. *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari.* Uppsala: Nordic Africa Institute, 2001.

- "Notes on the outcome of the ruling in the Central Kalahari Game Reserve case, Botswana." *Before Farming* 4 (2006): 1-3.

- "Impact of international mechanisms on indigenous rights in Botswana." The International Journal of Human Rights 15:1 (2011): 37-61.

Schauer, Frederick. "The Politics and Incentives of Legal Transplantation." *Governance in a Globalizing World.* Eds. Joseph S. Nye, Jr., and John Donahue. Washington, DC: Brookings, 2000. 253-68.

Scribner, Druscilla. "Norm Entrepreneurs and Supranational Adjudication." Paper delivered at Law and Society Association Annual Conference, Seattle, 28th May 2015.

Segal, Jeffrey A. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91:1 (1997): 28-44.

Segwai, Keto. "The departure of a nonconformist." *Mmegi* 14th November 2008.

Seitshiro, Kabelo. "Dow's BDP membership draws mixed feelings." 19th March 2012.

Selby, Angus. "Commercial farmers and the state: interest group politics and land reform in Zimbabwe." Unpublished PhD dissertation. Oxford University: Brasenose College, 2006.

Sharafi, Mitra. "A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire." *Law & Social Inquiry* 32:4 (2007): 1059-1094.

Silberbauer, George B. and Adam Kuper. "Kgalagari masters and Bushman serfs: some observations." *African Studies* 25:4 (1966): 171-180.

Slaughter, Anne-Marie (see also Burley, Anne-Marie). "A Typology of Transjudicial Communication." *University of Richmond Law Review* 29:1 (1994): 99-137.

- "A Global Community of Courts." *Harvard International Law Journal* 44:1 (2003): 191-219.

- *A New World Order*. Princeton, NJ: Princeton University Press, 2004.

- "A Brave New Judicial World." *American Exceptionalism and Human Rights*. Ed. Michael Ignatieff. Princeton University Press: Princeton, 2005. 277-303.

Slaughter, Anne-Marie and David Zaring. "Networking goes international: an update." *Annual Review of Law and Social Science* 2 (2006): 211-219.

Southall, Roger. *Liberation Movements in Power: Party & State in Southern Africa.* Woodbridge: James Currey, 2013.

Spies, Willie and Ben Freeth. "ACHPR unable to intervene over SADC Tribunal - AfriForum." *Politicsweb* 5th March 2014. Available at: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/twitter.com/page71654?oid=559617&sn=Detail&pid=71654 [accessed 19th April 2004].

Stephenson, Margaret and Suri Ratnapala Eds. *Mabo: A Judicial Revolution, the Aboriginal Land Rights Decision and its Impact on Australian Law.* St Lucia: University of Queensland Press, 1993.

Steytler, Nico. "The Judicialization of Namibian politics." *The Global Expansion Of Judicial Power.* Eds. Neal C. Tate and Torbjorn Vallinder New York: New York University Press, 1995. 485-512.

Taylor, Ian and Gladys Mokhawa. "Not forever: Botswana, conflict diamonds and the Bushmen." *African Affairs* 102:407 (2003): 261–283.

Tendi, Blessing-Miles. *Making History in Mugabe's Zimbabwe: Politics, Intellectuals and the Media.* Oxford: Peter Lang, 2010.

U.S. Embassy, Harare. "Farm Invasions: Zim Dismisses Sadc Tribunal." *Wikileaks* (Canonical id: 08HARARE639). 28th July 2008. Available at: http://leakwire.org/cables/cable/08HARARE639.html [accessed 16th July 2014].

Vanberg, Georg. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45:2 (2001): 346-361.

VonDoepp, Peter. "The Problem of Judicial Control in Africa's Neopatrimonial Democracies: Malawi and Zambia." *Political Science Quarterly* 120:2 (2005) 275-301.

- *Judicial Politics in New Democracies: Cases from Southern Africa.* Boulder: Lynne Rienner Publishers, 2009.

VonDoepp, Peter and Rachel Ellett. "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies." *Comparative Politics* 43:2 (2011): 147-165.

Waldron, Jeremy. "*Partly Laws Common to All Mankind"*: *Foreign Law in American Courts*. New Haven, CT: Yale University Press, 2012.

Widner, Jennifer A. with Daniel Scher. "Building Judicial Independence in Semi-Democracies: Uganda and Zimbabwe." *Rule by Law: The Politics of Courts in Authoritarian Regimes.* Eds. Tom Ginsburg

and Tamir Moustafa. Cambridge: Cambridge University Press, 2008. 235-260.

Wilmsen, Edwin. “Mutable Identities: Moving beyond Ethnicity in Botswana.” *Journal of Southern African Studies* 28:4 (2002): 825-841.

Whittington, Keith. “Legislative sanctions and the strategic environment of judicial review.” *International Journal of Constitutional Law* 1:3 (2003): 446-474.

Young, Katharine. “The World, through the Judge's Eye.” *Australian Yearbook of International Law* 28 (2009): 27-56.

Zimudzi, Tapiwa. “Review: Tshosa, Onkemetse, National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe.” *H-SAfrica* March 2002. Available at: http://www.h-net.org/reviews/showrev.php?id=6017 [accessed 19th April 2014].

Zips-Mairitsch, Manuela. *Lost Lands? (Land) rights of the San in Botswana and the legal concept of indigeneity in Africa.* Zürich: IWGIA, International Work Group for Indigenous Affairs, 2013.

ZLHR [Zimbabwe Lawyers For Human Rights]. “Urgent appeal on the Constitutional Amendment (No.17) Act.” September 6th 2005a. Available at: http://archive.kubatana.net/html/archive/hr/050906zlhr.asp?sector=LEGISL&year=2005&range_start=1 [accessed 19th April 2014].

- *Annual Report 2005*. Harare: ZLHR, 2005. Available at: archive.kubatana.net/docs/hr/zlhr_annual_report_2005.pdf [accessed 19th April 2014].

- “Key Litigation In The African Commission On Human And Peoples Rights On Zimbabwe”. Undated document. Available at: http://www1.umn.edu/humanrts/research/ZIM%20KEY%20LITIGATION%20IN%20ACHPR.pdf [accessed 19th April 2014].

Zongwe, Dunia, "The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations." *Comparative Research in Law & Political Economy: Research Paper* n.50. Toronto: Osgoode Hall Law School, 2009. Available at: http://digitalcommons.osgoode.yorku.ca/clpe/158 [accessed 19th April 2014].